See page 104

NO. 1045

IN THE

United States

Circuit Court of Appeals

Ninth Circuit.

APPEAL FROM UNITED STATES CIRCUIT COURT.

SOUTHERN DISTRICT OF CALIFORNIA

Southern Division.

Southern Pacific Railroad Company, *et al.*,
Appellants and Defendants.
vs.
The United States.

Brief for United States.

JOSEPH H. CALL,
Special United States Attorney.

SPENCER & PARKER, Law Printers, 238 New High St., Los Angeles, Cal.

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APPENDIX.

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STATEMENT.

This bill was filed on February 28, 1901, by the United States against the Southern Pacific Railroad Company, and numerous other defendants, to quiet title and to concel and annul patents to certain lands situated in California, erroneously issued by the United States to the Southern Pacific Railroad Company, as a part of its grant of March 3, 1871, in so far as such lands had not

been sold by said railroad company to *bona fide* purchasers. [R. 5, 14.] The bill further seeks an adjudication by the court as to what lands have been sold to *bona fide* purchasers and as to those, prays that the title of such purchasers may be confirmed, and that the government have and recover from the railroad company the ordinary government price for such lands.

Answers were filed by the defendants as follows:

The answer of Southern Pacific Railroad Company, the Central Trust Company of New York, as trustee, D. O. Mills and Homer S. King, as trustees, was filed August 3, 1901. [R. 82.]

The answer of I. N. Van Nuys was filed March 18, 1901. [R. 108.]

The answer of Riverside Vineyard Company was filed March 18, 1901. [R. 30.]

The answer of Charles H. Colwell and Russ Avery was filed May 24, 1901. [R. 43.]

The answer of J. P. Kyler was filed May 18, 1901. [R. 53.]

The answer of Frank Walker was filed June 11, 1901. [R. 71.]

The answer of H. S. Button was filed May 24, 1901. [R. 42.]

The answer of William H. Davis was filed May 24, 1901. [R. 62.]

Decree was entered upon the merits by the Circuit Court in favor of the Government quieting title to lands not patented, vacating patents for lands patented and not sold and for $1.25 per acre for patented lands sold

to *bona fide* purchasers, and confirming the titles of *bona fide* purchasers of patented lands. [R. 114.] The railroad and its trustees alone appeal.

The controlling facts in this case are the following:

On March 3, 1871, Congress made a grant of lands to aid in the construction of the Southern Pacific Railroad from a point near Tehachapa Pass via Los Angeles to the Colorado River, at or near Fort Yuma. [146 U. S. Stats. 292 and 16 U. S. Stats. 573.]

It is a conceded fact alleged in the bill and admitted by the answer [R. 85] and stipulated also [R. 131] that the map showing the line of railroad of the Southern Pacific Railroad Company as definitely located and constructed opposite to the lands described in the bill, was filed in the Interior Department in the year 1874, and it is conceded that the lands in suit are situate within the granted or place limits of the Southern Pacific grant.

It is also admitted by the pleadings and fully established by the evidence, that in the year 1838 a grant was made by the Mexican government to one Juan Bandini, of the land or rancho called Jurupa. [Record 150-161.] See also defendants' answer. [Record 82.]

This grant was one of specific boundaries, and not a grant of quantity.

The United States Board of Land Commissioners, upon petition of Juan Bandini, confirmed this grant to him under date of October 17, 1854. [Record 159-160.]

Upon appeal to the United States District Court, one Abel Stearns was substituted for Bandini [R. 187] and

the District Court affirmed the decree of the Board of Land Commissioners, thereby confirming the grant to Abel Stearns. [Record 163, 165.]

In the year 1872 the Rancho Jurupa confirmed to Abel Stearns as aforesaid, was duly surveyed by the Land Department of the United States, under orders of the Surveyor General for California.

The survey was made by William P. Reynolds, deputy surveyor, and his assistants, and in that year the field notes of the survey, together with a plat thereof, were duly returned to the office of the Surveyor General, and on February 26, 1872, the plat and field notes were formally approved by I. R. Harenburgh, surveyor general. [For map see Record 356, 357 and field notes Record 168, 177, 359.]

It is an undisputed fact in this case and was so found by the Circuit Court, that the lands in suit and described in the bill, are embraced within the boundaries of the Jurupa Rancho, as surveyed in 1872, and according to the map and field notes approved in that year by the Surveyor General.

Thereafter a dispute arose concerning the true boundaries of the Jurupa Rancho, and in the year 1877, a new survey was ordered [Record 205], which survey was made in the year 1878, excluding these lands, and upon such later survey, patent was issued on May 23, 1879, to Abel Stearns and accepted by him. For township plats showing both surveys see Record 221 and 620.

The map of definite location of the Southern Pacific Railroad, opposite to this land, as before stated, was filed

in the year 1874 and as it appears that from the year 1872 down to the year 1879, this land was embraced within the boundaries of the Jurupa Rancho as surveyed and approved, it was, under the firmly established decisions of this court and of the United States Supreme Court, *sub judice* in the year 1874, when the grant to the Southern Pacific Railroad took effect, and these lands could not have been operated upon by the grant to that company, which operated only on *public lands* and which expressly reserved and excepted from its operations, all lands reserved, and all lands as to which any adverse *claims* were made at the time of definite location.

Notwithstanding the reservation of these lands and the fact that they were excepted from the Southern Pacific grant, patents of the United States were erroneously issued to numerous tracts embraced within the Jurupa Rancho, according to the approved survey of 1872 as lands inuring to that company under its grant of 1871.

The bill of complaint seeks to vacate patents to the lands so erroneously patented so far as not sold by the Southern Pacific Railroad to *bona fide* purchasers, and seeks to determine and to quiet the title to the lands not so patented, and further, seeks an accounting from the railroad company for the government value of such lands as have been erroneously patented and sold to *bona fide* purchasers.

The decree of the Circuit Court was in favor of the government in all respects, which found the facts substantially as herein stated. [Opinion Record 123, decree Record 114.]

In the cases of Southern Pacific Railroad Company vs. Brown and same vs. Bray, 75 Federal, 85, this court had under consideration the title to lands situated precisely as the lands in the present suit. Those lands were also claimed by the Southern Pacific as a part of its grant of 1871, and they were embraced within the survey of the Jurupa Rancho, approved in 1872 and this court affirmed the decree of the Circuit Court, adjudging that those lands were excepted from the Southern Pacific grant.

That the lands in suit in the present case were *sub judice* in 1874, and were claimed as a part of the Jurupa Rancho, at that time, is conclusively established by the fact that they were surveyed and included in that rancho by the authorities of the United States, and by the affidavits of William P. Reynolds, U. S. Deputy Surveyor, and by five of his assistants, which affidavits are annexed to the field notes [Record 386,387]; all of said persons stating under oath

> "that in surveying the boundary lines of the Rancho Jurupa, situated in the county of San Bernardino, in the state of California, and finally confirmed to Abel Stearns, and that said rancho has been in all respects to the best of our knowledge and belief, well and faithfully surveyed, and the boundary monuments established according to the laws of the United States and the instructions of the Surveyor General."

Defendants' Contentions.

Counsel for the Southern Pacific again put forth the old and worn out claim that because the Reynolds' sur-

vey was not regular in all respects, and was not followed up to patent and having been finally rejected and a resurvey made excluding the lands in suit, that therefore such survey and acts of the government were insufficient to prevent the passage of the title to these lands to the Southern Pacific Railroad, and they urge in support of this threadbare argument, numerous grounds or reasons showing the irregularity of the Reynolds survey.

The doctrine of *sub judice* does not and never did rest upon the ground that the claim to the lands was a valid one, but only upon the ground that the lands were adversely claimed or were otherwise *sub judice,* which claim remained undetermined.

This doctrine which is referred to by this court in the Brown and Bray cases, is one so thoroughly established that it would not be strengthened by the citation of numerous authorities.

Of course if the Reynolds survey approved in 1872 had been regular in all respects, and if there had been no contraversy over the boundaries of the Jurupa, this controversy could not have arisen, for these lands would have been patented to Stearns.

It is because there was a controversy over the boundaries of the rancho and because different surveys were made, that the lands were held in reservation, and the lands thereby *sub judice* were excepted from the railroad grant.

The decree of the District Court confirming the Jurupa to Stearns as successor of Bandini, shows that the

grant so confirmed was one of specific boundaries, provided that the land within such boundaries be less than 11 square leagues, and if less, then confirmation was only as to the quantity of 11 square leagues. [Record 163,165.]

The court knows judicially, that a Spanish league is 2.635 English miles in length, and that one square league contains 6.94 square miles, and that 11 square leagues contain 48,857 acres.

The Reynolds survey including the lands in suit, approved in 1872, as stated upon the plat of survey [Record 356], embraced 38,887.42 acres, which is considerably less than 11 square leagues, which contains 48,857 acres.

The grant therefore, of the Jurupa Rancho, according to the Reynolds survey of 1872, which survey embraced more lands than any other survey of that grant, still contained less than 11 square leagues and the grant therefore was clearly one of specific boundaries and not a grant of quantity. It is a curious fact in this case, that the lands in suit were excluded from the Reynolds survey of the Jurupa Rancho, by reason of straightening the *north* line of the rancho. [See Reynolds' map, Record 356, and Minto map of patented rancho, Record 396.]

This is striking in view of the circumstance that the Secretary of the Interior in ordering a re-survey of the Jurupa, adopted the Reynolds survey, excepting as to the *eastern* and *southern* boundaries [Record 192, 193],

and yet the Southern Pacific Railroad Company appears to have been sufficiently influential in the Interior Department, even in those early days, to get a new survey made which would exclude a large part of the lands theretofore embraced in the Jurupa grant by changing the *northern* line.

The record shows that as early as 1877, the Southern Pacific Railroad Company, through its attorney, H. S. Brown, was interfering with the survey of the Jurupa Rrancho, and attempting to influence the action of the Department. [Record 209.]

Mistakes of Counsel for Appellants.

Counsel for the Southern Pacific state in their brief at page 26,

> "It is stipulated that the Southern Pacific has not received the full quantity of land promised in its grant."

It was not in fact so stipulated, but on the contrary, the stipulation made is as follows:

> "It is further stipulated that within the indemnity limits of the grant to the Southern Pacific Railroad Company made by the Act of Congress of March 3, 1871, and outside of the twenty mile limits, there now remain more than fifty thousand acres of surveyed public lands of the United States for which there has been no selection or application to select, made by said company." [Record 132, 133.]

It is a very different thing to stipulate that there are 50,000 acres of lands within the Southern Pacific *indemnity limits,* which have never been selected, and to

stipulate that the Southern Pacific has not received the quantity of lands promised in its grant. The alleged stipulation referred to by counsel [Record 488], grew out of a question propounded to Jerome Madden, land agent, and a witness for the Southern Pacific, asking him to state how many acres of land there were within the indemnity limits of the Southern Pacific which remained open lands, and his answer was: "I cannot without examination." Thereupon Mr. Call stated as follows: "I will concede that the quantity called for by the preceding question of Mr. Singer, exceeds 10,000 acres."

The facts thus established beyond dispute are, that there is an abundance of land within the limits of the Southern Pacific grant which it never had selected or attempted to select, and there is not a suggestion to the contrary, that there is a shortage in the Southern Pacific grant.

In Oregon Railroad v. United States, 189 U. S. 103, at page 115, the court said:

> "It is also said that all the lands within the indemnity limits were required to supply the deficit in place limits arising from the disposition prior to definite location by sale and otherwise of lands within the granted limits. *But the extent to which lieu lands could be required to supply such deficit in place lands could not be properly or legally determined until there was an adjustment of the grant of lands in respect to place limits.*"

Points and Authorities.

FIRST.

The right of the defendants to object to the jurisdiction in equity has been waived

The defendants answered to the merits without demurrer or plea to the jurisdiction in equity, and have put the government to the expense of taking of testimony, and the cause has been submitted and tried upon the merits.

Under these circumstances the defendants have waived any right to object to the final determination in this cause, as one in equity, the court having power to grant the relief sought.

United States v. Southern Pacific Railroad Co., 117 Fed. 544;

Williams v. Monroe, 101 Federal 322, 329;

Brown v. Lake Superior Co., 134 U. S. 530, 535, 536;

Insley v. United States, 150 U. S. 512, 515, 516;

Perrego v. Dodge, 163 U. S. 160, 164;

Kilbourn v. Sunderland, 130 U. S. 505, 514.

This was also the opinon of Judge Ross in the court below.

SECOND.

These lands were *sub judice* during the year 1874 when the grant to the Southern Pacific Railroad Company attached by filing map of definite location, and were excluded from that grant, and the patents thereto were invalid.

The precise question here presented was involved in the cases of Southern Pacific Railroad Company v. Brown and Bray, and were decided against the contentions of the railroad company by this court and by the United States Circuit Court in 68 Federal 333 and 75 Federal 85, which cases involved other tracts of land embraced within the Jurupa Rancho, as surveyed by Reynolds, and as to which lands the Southern Pacific Railroad Company sought a recovery from defendants Brown and Bray, and no appeal was taken from those decrees of this court.

The principle that lands embraced within the limits of a Mexican or Spanish grant, *sub judice* when the grant takes effect, or which are covered by a subsisting pre-emption or homestead filing, or mineral claim, or other *claims* or rights, are excepted from railroad grants is so thoroughly settled that citation of authority is hardly necessary, but some of the leading cases are the following:

Newhall v. Sanger, 92 U. S. 761;
Doolan v. Carr, 125 U. S. 618;
Cameron v. United States, 148 U. S. 301;
Witney v. Taylor, 158 U. S. 85;
Sioux City Railroad v. Griffey, 143 U. S. 32, 41;

Northern Pac. R. R. v. Musser-Sauntry, 168 U. S. 604;
Northern Pas. R. R. v. Sanders, 166 U. S. 620;
Bardon v. Northern Pac. R. R., 145 U. S. 535.

Whenever the law provides for a survey of a Mexican grant by the Commissioner of the General Land Office, or by his inferior officer, the Surveyor General for the District of California, it is presumed when such survey has been made and aproved that such survey was made in accordance with law, and will be binding upon the government, and all others, until reversed or set aside by a higher authority.

McCreery v. Haskell, 119 U. S. 327;
Tubbs v. Wilhoit, 138 U. S. 134.

As before mentioned, the Reynolds survey and field notes thereof were formally approved by the Surveyor General for California in the year 1872, which approval so remained until vacated by the Secretary of the Interior in 1879.

It was adjudged in the McCreery and Tubbs cases that where a survey had been approved by the Surveyor General, whether under the act of July 23, 1866, or some other act of Congress, that such approved survey was controlling and binding as to lands excluded from the Mexican grant by such survey and disposed of by the government, even though the action of the Surveyor General might thereafter be annulled.

The decisions of the Commissioner of the General Land Office of 1876, and of the Secretary of the Interior,

1878, in evidence herein, show that a controversy had been pending for many years concerning the true boundaries of the Jurupa Rancho, the claimants contending for a much larger area than admitted by adverse interests, and this controversy was not closed until patent was finally issued for the Jurupa Rancho to Stearns, successor of Bandini, on May 23, 1879, long after the grant to the Southern Pacific Railroad Company took effect.

It is contended by counsel for defendants that the doctrine of *sub judice* does not apply to these lands, for the alleged reason that the survey made by the Surveyor General, was commenced and completed before the Rancho Jurupa had been finally confirmed, and this contention is based upon the ground that an appeal was taken from the United States District Court confirming the grant, to the Supreme Court, which court did not issue its mandate until the year *1875*. [Record 507.]

(a) If the survey made and approved by the United States Surveyor General had been valid, these lands would have been patented to the claimants of the Jurupa Rancho. The circumstance that another reason has been discovered by counsel for defendants, why the survey made and approved by the Surveyor General, should have been reversed, and set aside as it was, does not in any wise mitigate against the contention of the government that the lands in suit were *sub judice* in 1874, for, by the showing made by counsel for defendants, it appears that the final mandate of the Supreme Court was not issued until 1875, while an approved survey by the

United States Surveyor General, had stood over these lands since 1872.

The fact that an appeal was taken from the decree of confirmation of the District Court, to the Supreme Court, which was dismissed in 1875, for failure to docket and file the record, is not new to this case. That fact was shown and was before this court in Southern Pacific Railroad v. Brown and Bray, which fact appears from Plaintiff's Exhibit 5 in the present case [Record 188 and 337], which is a part of the record taken from the former suits, of S. P. Rd. Co. v. Brown, *et al.*

As this court and the United States Supreme Court has often observed, it is not the validity of the claim which renders the land *sub judice* and prevents it from passing under a railroad grant, but it is the fact that a claim exists to the land, and that the controversy as to the title was still undetermined.

(b) Further, it does not appear that the decree of the United States District Court was *superseded* by any appeal to the Supreme Court. If not superseded the decree of the District Court remained in full force.

(c) Moreover, it does not appear from the record but that the survey made by the Surveyor General was commenced and completed prior to any appeal taken from the District Court to the Supreme Court.

(d) Moreover, it does not appear that any appeal was ever *perfected* in the Supreme Court, for it does appear from the order of dismissal that it was dismissed for the reason as follows: "It appears that the said appellant

has failed to have its cause filed and docketed in conformity to the rules of this court." [R. 189.]

Nothing in any of these proceedings show that the decree of confirmation of the District Court was not in force when the Reynolds survey was made or approved.

However that may be, the survey which was in fact made by the Surveyor General, including therein the lands in suit, shows that a *claim* was made to these lands which was undetermined when the railroad grant took effect in 1874.

(e) Again, it is urged by counsel for defendants, that the survey of the Rancho Jurupa was made under the Act of Congress of 1864, and that no survey under that act could be *completed* until approved by the Commissioner of the General Land Office.

It appears that the plat and field notes of the Reynolds survey of the Jurupa approved by the Surveyor General in 1872, were transmitted to Washington *and placed upon the files of the General Land Office* as the copy of the plat and field notes introduced in evidence in this cause are certified by the Commissioner of the General Land Office, as records being upon file in his office.

Referring to the general authority of the Surevyor General, over lands in this district, the Supreme Court said in Tubbs v. Wilhoit, 138 U. S. 142, 143:

> "Until April 17, 1879, it had not been the practice of the Land Department to require any specific approval by the Commissioner, either of surveys of the public lands, or plats of townships in accordance therewith, made by the Surveyor General of

the state before they were deemed so far final as to sanction sales or selections of the lands surveyed and platted."

And the court quoting from a late decision of Secretary Schurz, said:

"By the act of Congress, approved May 1, 1796, (1 Stat. 464) 'providing for the sale of the lands of the United States in the territory northwest of the river Ohio and above the mouth of the Kentucky River,' the Surveyor General was authorized to prepare plats of the townships surveyed, to keep one copy of the same in his office for public information, and to send other copies to the 'places of sale,' and to the Secretary of the Treasury. The present local land offices are equivalent to the 'places of sale' mentioned in the act of 1796, and, as a matter of practice, from that date to the present time the township plats prepared by the Surveyor General have been filed by him with the local officers, who thereupon proceeded to dispose of the public lands according to the laws of the United States. There is nothing in the act of 1796, or in the subsequent acts, which requires the approval of the Commissioner of the General Land Office before said survey becomes final and the plats authoritative. Such a theory is not only contrary to the letter and spirit of the various acts providing for the survey of the public lands, but is contrary to the uniform practice of this department. There can be no doubt but that under the act of July 4, 1836, reorganizing the General Land Office, the Commissioner has general supervision over all surveys, and that authority is exercised whenever error or fraud is alleged on the part of the Surveyor

> General. But when the survey is correct, it becomes final and effective when the plat is filed in the local office by that officer."

But it is in no wise material whether the survey could be finally made and completed until approved by the Commisisoner, because the fact that a survey was made by the officers of the United States who were authorized to make surveys shows that a claim was made to this land by the authority of the United States, as lands which should be and ought to be patented to the claimants of the Mexican grant, and such survey was initiated and carried through for the purpose of setting apart and reserving for the Mexican grant claimant the specific land to which he was entitled.

(f) The act of Congress of July 23, 1866, (Vol. 14, p. 218, Sec. 8) controlled the Reynolds survey of 1872, which provides as follows:

> "SEC. 8. That in all cases where a claim to land by virtue of a right or title derived from the Spanish or Mexican authorities has been finally confirmed, and a survey and plat thereof shall not have been requested within ten months from the passage of this act, as provided by sections six and seven of the act of July first, eighteen hundred and sixty-four, 'To expedite the settlement of titles to lands in the state of California,' and in all cases where a like claim shall hereafter be finally confirmed, and a survey and plat thereof shall not be requested, as provided by said sections within ten months after the passage of this act, or any final confirmation hereafter made, it shall be the duty of the Surveyor General

of the United States for California, as soon as practicable after the expriation of ten months from the passage of this act, or such final confirmation hereafter made, to cause the lines of the public surveys to be extended over such land, and he shall set off, in full satisfaction of such grant, and according to the lines of the public surveys, the quantity of land confirmed in such final decree, and as nearly as can be done in accordance with such decree; and all the land not included in such grant as so set off shall be subject to the general land laws of the United States."

In Durand v. Martin, 120 U. S. 366, 369, the court said:

"This survey was made in 1869, the claim having been finally confirmed in 1860. As the survey was not made until more than ten months after the act of July 23, 1866, 'to quiet land titles in California,' had become operative, its approval by the Surveyor General had the effect, under the ruling of this court in Fraser against O'Connor, 115 U. S. 102, of opening all lands within the exterior boundaries of the grant, but outside of those fixed by the survey, to selection or pre-emption entry as public lands, subject only to a defeat of title, if in the end the survey as made should be set aside and the boundaries of the grant finally extended so as to include the selection or the entry."

By virtue of the act of 1866, if a survey and plat had not been requested within ten months from the date of the approval of that act, it was the duty of the Surveyor General to complete the survey of the grant, and as the Reynolds survey was not made until more than ten

months after the passage of the act of July 23, 1866, and more than ten months after the confirmation of that grant, it was presumptively controlled by the terms of that act, and that survey by its approval would have been final and complete without any approval of any other officer, if it had not been set aside by order of the Secretary of the Interior.

THIRD.

This suit was properly brought and is maintainable in equity to quiet title to lands, to cancel patents to lands, and for the alternative relief in case such lands have passed into the hands of bona fide purchasers for the value of such lands.

(1.) The principal object of this suit is to determine the title to the lands as between the United States and the defendants.

The act of Congress of March 2, 1896, relating to the adjustment of railroad land grants, expressly authorizes any person claiming to be a *bona fide* purchaser from a railroad company of lands erroneously patented to the company and sold by it to maintain a suit in the United States courts against the United States, to secure a confirmation of his title.

The United States also has a right to maintain a bill in equity to quiet and determine title to lands claimed adversely to the government.

The Statutes of California, Code of Civil Procedure, Section 738, authorizes suits in equity to quiet and determine title to lands.

Pennie v. Hildreth, 81 Cal. 127, 130;
Pierce v. Felter, 53 Cal. 18.

It is well settled that the federal courts will administer such relief in equity where authorized by state statute.

Reynolds v. Crawfordsville, 112 U. S. 405, 412;
Chapman v. Brewer, 114 U. S. 158, 170, 171;
More v. Steinbach, 127 U. S. 70, 84;
Hammer v. Garfield, 130 U. S. 291, 295.

(2.) The right of the United States to vacate and annul patents erroneously issued by the Land Department, by bill in equity, is sustained by an unbroken line of authority.

United States v. Stone, 2 Wall. 525, 535;
United States v Minor, 114 U. S. 233;
Mullan v. United States, 118 U. S. 271;
United States v. Bell, &c. Company, 128 U. S. 315, 362;
Colorado &c. Co. v. United States, 123 U. S. 307, 313;
United States v. Southern Pacific R. R., 146 U. S. 570, 619;
Wisconsin Railroad v. United States, 164 U. S. 190, 211.

The jurisdiction in such cases is maintained in equity as arising in accident or mistake.

Whether the mistake is of law or of fact is of no consequence in cases of this character, for the reason that the officers of the Interior Department, who exercise

ministerial powers, cannot bind the United States by their unauthorized acts.

In Mullan v. United States, 118 U. S., at page 278, the court holding that patents erroneously issued could be vacated by a bill in equity, said:

> "It is no doubt true that the actual character of the lands was as well known at the Department of the Interior, as it was anywhere else, and that the Secretary approved the lists, not because he was mistaken about the facts, but because he was of opinion that coal lands were not mineral lands within the meaning of the act of 1853, and that they were open to selection by the state, but this does not alter the case. The list was certified without authority of law, and therefore by a mistake against which relief in equity may be afforded."

In Wisconsin Central Railroad v. United States, 123 U. S., at page 209, the court quoted the above extract from the Mullan case, with approval. See also:

Wisconsin Rd. v. U. S., 164 U. S. 190, 209, 212;
Story's Eq. Jur., Sec. 134.

Indeed, in every case which has been brought by the United States to vacate patents to lands which were excepted from the operation of a grant by Congress to a railroad or other person, the suit has been founded and maintained because of error of law in the officers of the Interior Department.

(2) The patents to these lands were issued to the Southern Pacific Railroad Company erroneously and under a mistake by the officers of the Interior Depart-

ment. The railroad company has sold most of them to *bona fide* purchasers, and by reason of the acts of the defendant railroad company the lands cannot be recovered by the United States, but these acts of the defendant do not defeat the power of a court of equity to grant relief, nor do they relieve the defendant from its liability to make restitution to the government.

Alternate Relief.

(3) The bill of complaint prays in the alternative for the government price of the lands in case the lands themselves cannot be recovered by reason of sales to *bona fide* purchasers.

The right of a complainant to plead in the alternative in such cases and the power of the court and its usual practice to grant relief in such cases is well settled.

May v. Claire, 11 Wall. 236, 237;
Cook v. Tullis, 18 Wall. 342;
Parkersburg v. Brown, 106 U. S. 487;
Pullman Company v Central Co., 171 U. S. 138, 147;
Story's Equity Pleading, Secs. 42a, 42b.

FOURTH.

Special jurisdiction in equity has been conferred by Congress upon the Circuit Court to confirm titles of bona fide purchasers and render judgment against the railroad company for value of lands.

The act of Congress of March 2, 1896, specially provides that if the court shall find that lands erroneously patented have been sold to *bona fide* purchasers, and such purchasers are before the court, that it shall confirm the title of the purchasers and render judgment in favor of the government for the value of the land, not exceeding the ordinary government price.

This is a constitutional exercise of power by Congress and creates an additional and new ground of equity which may be administered.

Holland v. Challen, 110 U. S. 15;

Arndt v. Griggs, 134 U. S. 316, 320;

Bardon v. Land Co., 157 U. S. 327, 330;

Cowley v. Railroad Co., 159 U. S. 569, 583;

United States v. Southern Pacific Railroad, 117 Fed. 544;

United States v. Oregon Railroad, 122 Fed. 541.

FIFTH.

This bill is cognizable in equity as one brought to avoid multiplicity of suits.

The numerous parties defendant in this cause might each indepedently and separately have maintained an action against the United States to determine title to the lands described in the bill and claimed by such defendant. Such a proceeding is authorized by the act of Congress of March 2, 1896, and but for this bill presenting the entire matter in a single suit, it may fairly be presumed that such numerous indepedent proceedings would have been brought. This suit in equity is therefore maintainable as one to avoid multiplicity, the defendants all claiming under the same title and source of title.

United States v. Southern Pacific Railroad Co., 117 Fed. 544;

Pomeroy's Eq. Jur. 256, 269;

Davis v. Gray, 16 Wall. 203, 232, 233;

Brown v. Guarantee Trust Co., 128 U. S. 403, 410;

Ogden v. Armstrong, 168 U. S. 224;

Smyth v. Ames, 169 U. S. 466;

Hayden v. Thompson (8 C. C. A.), 71 Fed. 60, 67;

Kelley v. Boettcher (8 C. C. A.), 85 Fed. 55, 64;

Ryan v. Seaboard & R. R. Co., 89 Fed. 397, 406;

Barcus v. Gates (4 C. C. A.), 89 Fed. 783, 791;

Bailey v. Tillinghast, 99 Fed. 801 (C. C. A.);

Whitehead v. Sweet, 126 Cal. 67, 75, 76;

Southern Pacific Company v. Robinson, 132 Cal. 408.

It appears, by all the authorities, including the above, that it is not necessary that the defendants should have a common or joint interest in the subject matter of the suit, but they may be joined in a single suit, to avoid multiplicity, when there is a question of fact or of law common to all.

In the present suit the defendants all claim title under the act of Congress of March 3, 1871, and they all claim to be *bona fide* purchasers under similar facts, and under the provisions of the acts of Congress of March 3, 1887, and March 2, 1896.

Not only are the questions of law common to all of the defendants, but the questions of fact are similar in each case; and, moreover, the defendants all claim under the Southern Pacific Railroad Company, a common source of title.

It is, therefore, submitted that this case is cognizable in equity to avoid a multiplicity of suits, if for no other reason, and if upon no other grounds.

SIXTH.

It is a well settled principle in equity that where land or other property has been transferred from one to another wrongfully or under a mistake, that the court will establish and construct a trust in the property, and in its proceeds, in favor of the beneficiary, and against the person wrongfully holding it, and will require the trustees to return the property or its value.

In the present case the lands were excepted from the Southern Pacific grant. The railroad company had no right to them, and that fact was known to the company as a matter of law.

It was not within the *intention* of the United States to convey them to the defendant, and that intent is shown by the granting act.

The defendant is therefore bound in equity to reconvey the lands to the United States if still within its power to do so, and if not, then to pay to the United States what it received for them, or the reasonable value of the lands. This duty is required as a matter of justice, and its enforcement is decreed by an unbroken line of authority:

United States v. Southern Pacific Co., 117 F. 544;
Perry on Trusts, Sec. 186;
Story's Eq. Jur., Secs. 134, 1261, 1263;
Pomeroy's Equity Jurisp., Secs. 155, 156, 1044;
May v. Le Claire, 11 Wall. 217, 236;
Cook v. Tullis, 18 Wall. 332, 341, 342;
Angle v. Chicago Rd., 151 U. S. 1, 26, 27;

Townsend v. Vanderwerker, 160 U. S. 171, 179;
New Orleans v. Warner, 175 U. S. 120, 129;
Clews v. Jamieson, 182 U. S. 461, 479.

The provisions of the California Statutes are in full harmony with the general principles of equity governing such transactions.

It is provided in Civil Code of California, Sections 2224, 2229 and 2237, as follows:

> "Sec. 2224. One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained for the benefit of the person who would otherwise have had it.
>
> "Sec. 2229. A trustee may not use or deal with the trust property for his own profit, or for any other purpose unconnected with the trust, in any manner.
>
> "Sec. 2237. A trustee who uses or disposes of the trust property, contrary to section 2229, may, at the option of the beneficiary, be required to account for all profits so made, or to pay the value of its use, and, if he has disposed thereof, to replace it, with its fruits, or to account for its proceeds, with interest."

In Taylor v. Benham, 5 How. 233, at page 274, where a trustee had disposed of trust property, the Supreme Court said:

> "So, every person who receives money to be paid to another, or to be applied to a particular purpose, to which he does not apply it, is a trustee, and may be sued either at law, for money had and received, or in equity, as a trustee, for a breach of

trust.' Kane v. Bloodgood, 7 Johns. Ch. Rep. 110; Scott v. Surman, Willes 404; Shakeshaft's case, 3 Bro. Ch. Cas. 198.

"He is liable, then, first, on the ground that the *cestui que* trusts might confirm the sale and resort to the proceeds, as they finally did in this case. Story's Eq. Jurisp., Sec. 1262; 2 Johns. Ch. R. 442; 1 *ibid.* 581."

An implied or constructive trust is deemed by courts of equity to exist when the property of one has been acquired by another by wrong, error, accident or *mistake*.. The subject is treated of by leading authorities as follows:

In Perry on Trusts, section 186, it is said:

"If a deed is drawn by accident or mistake to embrace property not intended by the parties, equity will construe the grantee to be a trustee, and will execute the trust by reforming the deed, or by ordering a re-conveyance. It would be against natural right to allow a person to hold property which he never intended to buy, and which has come to him by such mistake."

In Pomeroy's Equity Jurisprudence, it is said at Sections 155 and 1044:

"Section 155. The second great division of trusts, and the one which in this country especially affords the widest field for the jurisdiction of equity in granting its special remedies so superior to mere recoveries of damages, embraces those which arise by operation of law from the deeds, wills, contracts, acts or conduct of parties, without any *express* intention, and often without *any* intention, but always without any words of declaration

or creation. They are of two species, 'resulting' and ' constructive,' which latter are sometimes called trusts *ex maleficio;* and both these species are properly described by the generic term 'implied trusts.' * *

"If one party obtains the legal title to property not only by fraud or by violation of confidence or of fiduciary relations, but in any other unconscientious manner, so that he cannot equitably retain the property which really belongs to another, equity carries out its theory of a double ownership, equitable and legal, by impressing a constructive trust upon the property in favor of the one who is in good conscience entitled to it, and who is considered in equity as the beneficial owner." * * *

"Section 1044. Constructive trusts include all those instances in which a trust is raised by the doctrines of equity for the purpose of working out justice in the most efficient manner, where there is no intention of the parties to create such a relation and in most cases contrary to the intention of the one holding the legal title and where there is no express or implied written or verbal declaration of the trust. They arise when the legal title to property is obtained by a person in violation, express or implied, of some duty owed to the one who is equitably entitled, and when the property thus obtained is held in hostility to his beneficial rights of ownership. As the trusts of this class are imposed by equity, contrary to the trustee's intention and will, upon property in his hands, they are often termed *trusts in invitum;* and this phrase furnishes a criterion generally accurate and suffi-

cient for determining what trusts are truly 'constructive.' "

When once the property has been acquired by mistake and under circumstances in which a court of equity for purposes of justice decrees the existence of a trust, such trust follows the proceeds derived from such property in whatsoever form received.

The beneficiary is not bound by the acts of the trustee, but has an option to recover the property if not transferred, or if sold to *bona fide* purchasers to confirm the sale, and seize upon the proceeds.

The principle is stated in Story's Equity Jurisprudence, at Section 1262, as follows:

> "In cases of this sort, the *cestui que trust* (the beneficiary) is not at all bound by the act of the other party. He has therefore an option to insist upon taking the property; or he may disclaim any title thereto, and proceed upon any other remedies, to which he is entitled, either *in rem* or *in personam*. The substituted fund is only liable to his option. But he cannot insist upon opposite and repugnant rights. Thus, for example, if a trustee of land has sold the land, in violation of his trust, the beneficiary cannot insist upon having the land, and also the notes given for the purchase money; for, by taking the latter, at least, so far as it respects the purchaser, he must be deemed to affirm the sale. On the other hand, by following his title in the land, he repudiates the sale."

In May v. Le Claire, 11 Wall., at pages 236 and 237, the court said:

> "There are kindred principles in equity juris-

prudence whence, indeed, these rules of the common law seem to have been derived. Where a trustee has abused his trust in the same manner the *cestui que trust* has the option to take the original or the substituted property; and if either has passed into the hands of a *bona fide* purchaser without notice, then its value in money. If the trust property comes back into the hands of the trustee, that fact does not affect the rights of the *cestui que trust.* The cardinal principle is that the wrongdoer shall derive no benefit from his wrong. The entire profits belong to the *cestui que trust,* and equity will so mould and apply the remedy as to give them to him.

* * * * * * * * *

"In this case more than half the residuary devisees of Antoine Le Claire are not before us. We cannot, therefore, decree the conveyance of real estate, but his legal representatives are before us, and we can give a money decree against them, embracing the value of the land, which we might otherwise adjudge to be conveyed."

* * * * * * * * *

"All those securities, including the collaterals, belonged in equity to May from the time they were deposited with Cook & Sargent. LeClaire had no right to change their form or to dispose of them, as was done in carrying out the compromise agreement. It is within the power of this court, in the exercise of its equitable jurisdiction, to annul that arrangement, and hold Davenport and LeClaire's estate liable in all respects as if the compromise had not been made. *But it is also in our power to confirm the transaction, and upon the principles of constructive trusts, to give May its fruits instead*

of pursuing the effects themselves. This, as the case is presented in the record, we deem the proper course."

In Cook v. Tullis, 18 Wall., at page 342, the court said:

> "that property acquired by a wrongful appropriation of other property covered by a trust, is itself subject to the same trust. It cannot alter the case that the newly acquired property, instead of being purchased with the proceeds of the original property, is obtained by a direct exchange for it. The real question in both cases is, what has taken the place of the property in its original form?"

In Pullman Car Company v. Central Transportation Company, in which the jurisdiction in equity was sustained the court said: [See 171 U. S. 150. 151.]

> "The courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties so far as could be done consistently with adherence to law, by permitting property or money parted with on the faith of the unlawful contract to be recovered back or compensation to be made for it. In such case, however, the action is not maintained upon the unlawful contract nor according to its terms, but on an *implied contract* of the defendant to return, or failing to do that, to make compensation for the property or money which it had no right to retain." * * *

In Clews v. Jamieson, 182 U. S., at pages 479, 480, the court said:

> "Pomeroy in his work on Equity Jurisprudence,

second edition, instances among other equitable estates and interests which come within the jurisdiction of a court of equity, those of trusts. In volume 1, at section 151, he says: 'The whole system fell within the exclusive jurisdiction of chancery; the doctrine of trusts became and continues to be the most efficient instrument in the hands of a chancellor for maintaining justice, good faith, and good conscience; and it has been extended so as to embrace not only lands, but chattels, funds of every kind, things in action, and moneys.'

"All possible trusts, whether express or implied, are within the jurisdiction of the chancellor. In this case the committee, as trustee, was charged with the performance of some active and substantial duty in respect to the management and payment of the funds in its hands, and it was its duty to see that the objects of its creation were properly accomplished. The fact that the relief demanded is a recovery of money only, is not important in deciding the question as to the jurisdiction of equity. The remedies which such a court may give 'depend upon the nature and object of the trust; sometimes they are specific in their character, and of a kind which the law courts cannot administer, but often they are of the same general kind as those obtained in legal actions, being mere recoveries of money. A court of equity will always, by its decree, declare the rights, interest or estate of the *cestui que trust,* and will compel the trustee to do all the specified acts required of him by the terms of the trust. *It often happens that the final relief to be obtained by the cestui que trust consists in the recovery of money. This remedy the courts of equity will always decree when neces-*

sary, whether it is confined to the payment of a single specific sum, or involves an accounting by the trustee for all that he has done in pursuance of the trust, and a distribution of the trust moneys among all the benficiaries who are entitled to share therein.'. I Pom. Eq. Jur. sec. 158."

Counsel for appellants (Defts. Brief, p. 27) undertake to quote from the opinion in Gaines v. Miller, 111 U. S. 397, as follows:

> "Whenever one person has in his hands money equitably belonging to another, that other person may recover it by assumpsit for money had and received. (Citing a list of authorities.) The remedy at law is adequate and complete."

Immediately following the above statement the court proceeded in its opinion as follows:

> *"There is no averment in the bill of complaint of any ground of equity jurisdiction. No trust is alleged, no discovery is sought. The appellant has no lien on the property of Hammond's estate and avers none."*

Reading all that the court said upon that subject will show that the case of Gaines v. Miller in no respect resembles the present suit, which does allege that these patents were erroneously issued by the United States to the railroad company and presents the following grounds of equity: (1) a suit to quiet title to lands, (2) a suit to vacate patents to lands, (3) the alternative relief sought for the value of the lands in lieu of the lands themselves, in case of sales to *bona fide* purchasers, (4) a special jurisdiction in equity conferred by the act of Congress of 1896, (5) numerous defendants show-

ing that the bill may be maintained to avoid multiplicity of actions by those defendants against the United States and by the United States against them, (6) to relieve upon the ground of mistake in the issuance of these patents, and an application of the equitable principle, that a trust exists in the money received by the defendant from such lands.

It is submitted that the cases hereinbefore cited are controlling upon these branches of equity.

SEVENTH.

The principal is well settled that where a court of equity takes jurisdiction of a cause upon one ground, pertaining either to its exclusive or concurrent jurisdiction, that it will retain it to do complete justice, even to granting legal remedies.

United States v. Southern Pacific Railroad Co., 117 F. 544;
United States v. Union Pacific Railroad Co., 160 U. S. 1, at page 52;
Ober v. Gallagher, 93 U. S. 199;
Root v. Railway, 105 U. S. 189, 205, 208;
Ward v. Todd, 103 U. S. 327;
Joy v. St. Louis, 138 U. C. 1;
Hopkins v. Grimshaw, 165 U. S. 342, at page 358;
Smyth v. Ames, 169 U. S. 466, 516, 517;
Peck v. Ayers, 116 Fed. (C. C. A.) 273;
Lynch v. Elevated Railroad Co., 129 N. Y. 274;
Douglas v. Lumber Co., 118 F. 438 (C. C. A.)

EIGHTH.

(1) By the authority reserved in Congress to alter, amend or repeal the act of July 27, 1866, Sec. 20 (see appendix) the United States may pass any supplemental law, the object of which is to carry out the national purposes disclosed by the act of 1866, the purposes of which mainly were to secure to the United States the use of the road, and to adjust the grant to the railroad company awarding to it what it is entitled to, and to the government that which is reserved.

Atlantic and Pacific Railroad v. United States, 76 Fed. 186, 196;

United States v. Union Pacific Railroad, 160 U. S. 1, 32, 33;

Shields v. Ohio, 95 U. S. 319;

Wisconsin Railroad v. United States, 164 U. S. 190, 205;

United States v. Oregon Rd., 176 U. S. 47, 48.

The confirmatory act of March 2, 1896, requiring the railroad company to repay to the United States the government price of the lands, was passed in the interests of the railroad company, and has been fully accepted and adopted by the company, and the company is now estopped from denying its liability.

It cannot be doubted but that the act of March 2, 1896, was for the benefit of the Southern Pacific Company. This is apparent from the fact, as shown by Exhibit "A" to defendant's answer, that the lands were sold at a price largely in excess of the government value.

The answer alleges that the lands were so sold to *bona fide* purchasers. It is, therefore, obvious that the confirmation of the title alone will relieve the railroad company from the obligation to repay the purchase price, by reason of failure of title.

It is well settled that where an act is passed which is for the benefit, or in the interest of a corporation or person, it will be presumed that the act was passed at the request of such corporation, and that the company has accepted its provisions.

In taking the benefits of the act the company, of course, is charged with its burdens.

United States v. S. P. Rd., 117 F. 544.

In this case we are not, however, required to rely upon the legal presumption of acceptance, if that were necessary, but we have evidence in the record that the company did in fact accept the provisions of this act and claim its benefits.

The answer of the Southern Pacific Railroad Company and the trustees in its mortgage bonds, in the present case, relies upon and seeks to take the benefits of the act of March 2, 1896. The answer allges [Record 96]:

> "That prior to *March 2, 1896,* the defendant Southern Pacific Railroad Company duly issued, sold and delivered negotiable bonds secured by this last mentioned mortgage or deed of trust of the face value of more than $10,000,000 to *bona fide* purchasers thereof, who purchased the same in good faith, without notice of any claim or demand of the United States to or respectiong any of the said

lands, and each and all of said purchasers paid full value for the said lands, and were and are *bona fide* purchasers of the same."

The answer also contains further allegations showing that it had placed the lands beyond the reach of the court —facts which cause the act of 1896 to operate. [R. 96.]

NINTH.

The contention of appellants that the holders of its bonds alleged to be secured upon the lands in suit, are bona fide purchasers, is without merit.

(*a*) The alleged mortgages do not embrace these lands, but by their terms cover only *lands granted to the Southern Pacific Railroad Company by the acts of Congress of 1871 and 1866,* and these lands were not so granted.

(b) The adjusment act of 1887 protecting titles of *bona fide* purchasers (see 24 U. S. Stats. 556, Sec. 4), provides as follows:

> "That a mortgage or pledge of said lands by the company shall not be deemed as a sale for the purpose of this act."

It has been frequently determined by the United States Supreme Court in former litigations, with the Southern Pacific Railroad Company, that the aforesaid adjustment acts do not protect bondholders under the mortgages or deeds of trust set up in the answer of that company in the present suit.

United States v. Southern Pacific, 146 U. S. 570, 619.

Southern Pacific Railroad v. United States, 168 U. S. 1, 66.

Southern Pacific Railroad v. United States, 183 U. S. 519; and

Southern Pacific Railroad v. United States, 189 U. S. 447.

In all these cases the trustees of the mortgage bonds of the Southern Pacific Railroad Company were parties defendant and in all of them rights were asserted as *bona fide* purchasers of the lands in suit, by virtue of the mortgages or deeds of trust and in all of them that contention was denied.

TENTH.

That the Southern Pacific Railroad Company has or Claims to have a Right to Select other Lands as Indemnity for the Lands which are the Subject of this Suit, is not a Defense to this Bill.

(a) The Southern Pacific Railroad Company during the thirty odd years since the grant of March 3, 1871, was made to it, has not attempted to select indemnity lands for lands lost within its place limits, which it had a right to select, for them, but has attempted to hold as "place lands" those very valuable lands which were excepted from its grant situated in close proximity to large cities and towns.

It is stipulated in this case, as follows: [R. 132.]

> "It is further stipulated that within the indemnity limits of the grant to the Southern Pacific Railroad Company made by the Act of Congress of

March 3, 1871, and outside of the twenty mile limits, there now remain more than fifty thousand acres of surveyed public lands of the United States for which there has been no selection or application to select, made by said company."

This stipulation of fact disposes of the contention made by the railroad company that there are no other lands to select as indemnity for the lands described in the bill.

United States v. Southern Pacific Railroad Co., 117 F. 544;

United States v. Winona Railroad Co., 165 U. S. 463, 481, 482.

(*b*) Moreover, nothing is more firmly established than a naked right to acquire public lands cannot be than that a naked right to acquire public lands cannot be enforced against the United States in the courts by any judicial proceeding.

The United States did not guarantee any particular quantity of indemnity lands, or at any particular time, to the railroad companies, and in all the legislation the government retained political and judicial control over the disposition of the lands.

The courts have uniformly refused to enforce against the government any claim of title to particular lands, especially where the issue of patents for them involved the exercise of political or judicial power, or the determination of antecedent facts.

In United States v. Jones, 131 U. S. 1, at page 19, the court said:

"We should have been somewhat surprised to find that the administration of vast public interests like that of the public lands, which belongs so appropriately to the political department, had been cast upon the courts—which it surely would have been if such a wide door had been opened for suing the government to obtain patents and establish land claims, as the counsel for the appellees in these cases seems to imagine. We are satisfied that the door has not yet been thrown open thus wide."

In the very recent case of Southern Pacific Railroad Company v. Bell, 183 U. S. 675, 690, the court adjudged that no right or title attached in the Southern Pacific Railroad Company to indemnity lands, until the lands had been selected by the railroad company and such selection approved by the Secretary of the Interior.

To the same effect are the decisions in

Hewitt v. Schultz, 180 U. S. 139;

Wisconsin Railroad v. Price County, 133 U. S. 496, 511;

Oregon Rd. v. U. S. 189; U. S. 103, 116.

It has uniformly been ruled that the action of the Interior Department in awarding patents to lands, or patents for inventions, cannot be controlled by the courts except where they err in law.

Gaines v. Thompson, 7 Wall. 347;

United States v. Schurz, 102 U. S. 378;

Butterworth v. United States, 112 U. S. 50;

United States v. Black, 128 U. S. 40;

Riverside Oil Co. v. Hitchcock, 190 U. S. 316.

It follows from these principles that even if there were

no indemnity lands remaining in the Southern Pacific grant, that company could not enforce in the courts a right to any such lands, such action being a usurpation of the powers of the Interior Department.

(*c*) Indeed, in the recent case of Oregon Railroad v. United States, 189 U. S. 103, 115, the court said:

> "But the extent to which lieu lands could be required to supply such deficit in place limits, could not be properly or legally determined until there was an adjustment of the grant of lands in respect to place limits."

(*b*) Counsel for appellants erroneously contending as before pointed out that the Southern Pacific had not received the full quantity of lands promised to it in its grant, proceed to quote from United States v. Winona Railroad, 165 U. S. 482, giving the quotation as follows, at page 26 of appellant's brief:

> "But lastly and chiefly it does not appear from the record either that the railroad company received an excess of lands or has ever received (these lands included) the full quantity of lands provided in the grant."

Now the full quotation from the said opinion of the Supreme Court touching this matter, is as follows (pages 481, 482):

> "If it be suggested that under the scope of these acts, though the suit must fail so far as it is one to set aside and cancel the certification, it may yet be maintained against the defendant railroad company for the value of the lands so erroneously certified, and that the decree should be modified to this extent,

it is sufficient to say that, first, the government has not asked any such decree; second, that it may be doubtful whether for the mere purpose of recovering money an action at law must not be the remedy pursued; but lastly, and chiefly, that it does not appear from this record either that the railroad company received an excess of lands or has even received (these lands included) the full quantity of lands promised in the grant; *and further, that it does not appear that there were not within the granted or indemnity limits, lands which the company might have rightfully received but for this erroneous certification."*

Italics are inserted in this brief to call attention to the part inadvertently omitted by counsel, as it seems to have been in the mind of the court in using the conjunction "and" that if it had appeared that there were other lands which might have been selected by the company, but which were not selected, that a recovery might have been had even in that case.

The stipulated facts in the present case that there are 50,000 acres of such lands open to selection by the Southern Pacific, removes from discussion the possible defense suggested in the opinion of the Supreme Court, and the further circumstance that the present bill does expressly seek as alternative relief, the recovery of the government price of the lands, and presents a suit clearly cognizable in equity upon other grounds, shows that the present case is in no wise controlled by the Winona case, as pointed out by Judge Ross in his opinion in 117 U. S. 544.

ELEVENTH.

For such of the lands as have not been sold by the railroad the Government is entitled to a decree, and for such as have been sold to bona fide purchasers, the Government is entitled to a judgement for $1.25 per acre.

See acts of Congress of March 3, 1887, and March 2, 1896;

United States v. Southern Pacific Railroad Co., 177 F. 544;

And numerous cases *supra.*

As declared in these acts of Congress and as pointed out in the opinion of Judge Ross, above mentioned, if it were not for the limitation of the liability of the railroad company to one dollar and twenty-five cents per acre, in the act of 1896, the government would be entitled to recover the full value of the lands, or the amount received by the railroad company upon a sale to any *bona fide* purchaser, but as the government has seen fit to donate the excess over and above one dollar and twenty-five cents per acre to the Southern Pacific Railroad Company, no relief is sought by this bill for such excess.

Respectfully submitted,

JOSEPH H. CALL,

Special United States Attorney.

APPENDIX.

ACTS OF CONGRESS.

ATLANTIC AND PACIFIC GRANT.

July 27, 1866 (14 Stat., 292).

AN ACT Granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific Coast.

Section 1 incorporated the Atlantic and Pacific Railroad Company and provided for the construction and location of a line of railroad, as follows:

"Beginning at or near the town of Springfield, in the State of Missouri, thence to the western boundary line of said State, and thence by the most eligible railroad route, as shall be determined by said company to a point on the Canadian river, thence to the town of Albuquerque, on the River Del Norte, and thence by way of Aqua Frio, or other suitable pass, to the headwaters of the Colorado Chiquito, and thence along the thirty-fifth parallel of latitude as near as may be found most suitable for a railway route to the Colorado river, at such point as may be selected by said company for crossing; thence by the most practicable and eligible route to the Pacific."

Sestion 2 grants a right of way, etc.

"SEC. 3. *And be it further enacted,* That there be, and hereby is, granted to the Atlantic and Pacific Railroad Company, its successors and assigns, for the pur-

pose of aiding in the construction of said railroad and telegraph line to the Pacific Coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores over the route of said line of railway and its branches, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State; and whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is designated by a plat thereof, filed in the office of the Commissioner of the General Land Office, and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections, and not including the reserved numbers: *Provided,* That if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act: *Provided,*

further, That the railroad company receiving the previous grant of land may assign their interest to said 'Atlantic and Pacific Railroad Company,' or may consolidate, confederate, and associate with said company upon the terms named in the first and seventeenth sections of this act: *Provided further,* That all mineral lands be, and the same are hereby, excluded from the operations of this act; and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in odd-numbered sections nearest to the line of said road, and within twenty miles thereof, may be selected as above provided: *And provided further,* That the word 'mineral,' when it occurs in this act, shall not be held to include iron or coal: *And provided further,* That no money shall be drawn from the Treasury of the United States to aid in the construction of the said 'Atlantic and Pacific Railroad.' "

"SEC. 6. *And be it further enacted,* That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale or entry or pre-emption before or after they are surveyed except by said company as provided in this act; but the provisions of the act of September, 1841, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled, 'An act to secure homesteads to actual settlers on the public domain,' approved May 20, 1862, shall be, and the same

are, hereby extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said company."

"SEC. 8. *And be it further enacted,* That each and every grant, right, and privilege herein, are so made and given to and accepted by said Atlantic and Pacific Railroad Company upon and subject to the following conditions, namely: That the said company shall commence the work on said road within two years from the approval of this act by the President, and shall complete not less than fifty miles per year after the second year, and shall construct, equip, furnish, and complete the main line of the whole road by the fourth day of July, Anno Domini eighteen hundred seventy-eight."

"SEC 11. *An be it further enacted,* That said Atlantic and Pacific Railroad, or any part thereof, shall be a post route and military road, subject to the use of the United States for postal, military, naval and all other Government service, and also subject to such regulations as Congress may impose restricting the charges for such Government transportation."

"SEC. 18. *And be it further enacted,* That the Southern Pacific Railroad, a company incorporated under the laws of the State of California, is hereby authorized to connect with the said Atlantic and Pacific Railroad, formed under this act, at such point near the boundary line of the State of California, as they shall deem most suitable for a railroad line to San Francisco; and shall have a uniform gauge and rate of freight or fare with said road, and in consideration thereof, to aid in its con-

struction, shall have similar grants of land, subject to all the conditions and limitations herein provided; and shall be required to construct its road on the like regulations, as to time and manner, with the Atlantic and Pacific Railroad herein provided for."

"SEC. 20. *And be it further enacted,* That the better to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the Government at all times, but particularly in time of war, the use and benefits of the same for postal, military, and other purposes, Congress may, at any time, having due regard for the rights of said Atlantic and Pacific Railroad Company, add to, alter, amend, or repeal this act."

TEXAS PACIFIC AND SOUTHERN PACIFIC ACT.

March 3, 1871 (16 Stat. L., 573, 579).

"AN ACT To incorporate the Texas Pacific Railroad Company and to aid in the construction of its road, and for other purposes."

Sections 1 to 22 of this act incorporated and made a grant of lands to the Texas Pacific Railroad Company.

Section 23 provided as follows:

"That for the purpose of connecting the Texas Pacific Railroad with the city of San Francisco, the Southern Pacific Railroad Company of California is hereby authorized (subject to the laws of California) to construct a line of railroad from a point at or near Tehachapa Pass, by way of Los Angeles, to the Texas Pacific Railroad at or near the Colorado River, with the same

rights, grants and privileges, and subject to the same limitations, restrictions, and conditions as were granted to said Southern Pacific Railroad Company of California by the act of July twenty-seven, eighteen hundred and sixty-six: *Provided, however,* That this section shall in no way affect or impair the rights, present or prospective, of the Atlantic and Pacific Railroad Company or any other railroad company."

ACT OF CONGRESS OF MARCH 3, 1887.

(24 Stats. 556)

AN ACT to provide for the adjustment of land grants made by Congress to aid in the construction of railroads, and for the forfeiture of unearned lands, and for other purposes.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That the Secretary of the Interior be, and is hereby, authorized and directed to immediately adjust, in accordance with the decisions of the Supreme Court, each of the railroad grants made by Congress to aid in the construction of railroads and hertofore unadjusted.

SEC. 2. That if it shall appear, upon the completion of such adjustments respectfully, or sooner, that lands have been, from any cause, heretofore erroneously certified or patented by the United States, to or for the use or benefit of any company claiming by, through or under grant from the United States, to aid in the construction of a railroad, it shall be the duty of the Secretary of the Interior to thereupon demand from such company a relinquishment or re-conveyance to the United States of

all such lands, whether within granted or indemnity limits; and if such company shall neglect or fail to so re-convey such lands to the United States within ninety days after the aforesaid demand shall have been made, it shall thereupon be the duty of the Attorney-General to commence and prosecute in the proper courts the necessary proceedings to cancel all patents, certification, or other evidence of title heretofore issued for such lands, and to retsore the title thereof to the United States.

Sec. 3. That if, in the adjustment of said grants, it shall appear that the homestead or pre-emption entry of any bona fide settler has been erroneously cancelled on account of any railroad grant or the withdrawal of public lands from market, such settler upon application shall be reinstated in all his rights and allowed to perfect his entry by complying with the public land laws: *Provided,* That he has not located another claim or made an entry in lieu of the one so erroneously canceled: *And provided also,* That he did not voluntarily abandon said original entry: *And provided further,* That if any of said settlers do not renew their application to be reinstated within a reasonable time, to be fixed by the Secretary of the Interior, then all such unclaimed lands shall be disposed of under the public land laws, with priority of right given to bona fide purchasers of said unclaimed lands, if any, and if there be no such purchesers, then to bona fide settlers residing thereon.

Sec. 4. That as to all lands, except those mentioned in the foregoing section, which have been so erroneously certified or patented as aforesaid, and which have been

sold by the grantee company to citizens of the United States, or to persons who have declared their intention to become such citizens, the person or persons so purchasing in good faith, his heirs or assigns, shall be entitled to the land so purchased upon making proof of the fact of such purchase at the proper land office, within such time and under such rules as may be prescribed by the Secretary of the Interior, after the grants, respectively, shall have been adjusted; and patents of the United States shall issue therefor, and shall relate back to the date of the original certification of patenting, and the Secretary of the Interior, on behalf of the United States, shall demand payment from the company which has so disposed of such lands of an amount equal to the Government price of similar lands; and in case of neglect or refusal of such company to make payment as hereafter specified, within ninety days after the demand shall have been made, the Attorney-General shall cause suit or suits to be brought against such company for the said amount: *Provided,* That nothing in this act shall prevent any purchaser of lands erroneously withdrawn, certified or patented as aforesaid from recovering the purchase money therefor from the grantee company, less the amount paid to the United States by such company as by this act required: *And provided,* That a mortgage or pledge of said lands by the company shall not be considered as a sale for the purpose of this act, nor shall this act be construed as a declaration of forfeiture of any portion of any land grant for conditions broken, or as authorizing an entry for the same, or as a waiver of

any rights that the United States may have on account of any breach of said conditions.

SEC. 5. That where any said company shall have sold to citizens of the United States, or to persons who have declared their intention to become such citizens, as a part of its grant, lands not conveyed to or for the use of such company, said lands being the numbered sections prescribed in the grant, and being coterminous with the constructed parts of said road, and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the bona fide purchaser thereof from said company to make payment to the United States for said lands at the ordinary Government price for like lands, and thereupon patents shall issue therefor to the said bona fide purchaser, his heirs or assigns: *Provided,* That all lands shall be excepted from the provisions of this section what at the date of such sales were in the bona fide occupation of adverse claimants under the pre-emption or homestead laws of the United States, and whose claims and occupation have not since been voluntarily abandoned, as to which excepted lands the said pre-emption and homestead claimants shall be permitted to perfect their proofs and entries and receive patents therefor: *Provided further,* That this section shall not apply to lands settled upon subsequent to the first day of December, eighteen hundred and eighty-two, by persons claiming to enter the same under the settlement laws of the United States, as to which lands the parties claiming the same as aforesaid shall be entitled to prove up and enter as in other like cases.

SEC. 7. That no more lands shall be certified or conveyed to any State or to any corporation or individual, for the benefit of either of the companies herein mentioned, where it shall appear to the Secretary of the Interior that such transfers may create an excess over the quantity of lands to which such State, corporation, or individual would be rightfully entitled."

Approved, March 3, 1887. (24 Stat., 556.)

ACT OF CONGRESS, FEBRUARY 12, 1896.

(29 Stat. 6.)

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That section four of an Act entitled 'An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands, and for other purposes,' approved March third, eighteen hundred and eighty-seven, be, and the same is hereby, amended by adding thereto the following proviso: *'Provided further,* That where such purchasers, their heirs or assigns, have paid only a portion of the purchase price to the company, which is less than the Government price of similar lands, they shall be required, before the delivery of patent for their lands, to pay to the Government a sum equal to the difference between the portion of the purchase price so paid and the Government price, and in such case the amount demanded from the company shall be the amount paid to it by such purchaser.' "

ACT OF CONGRESS OF MARCH 2, 1896.

(29 Stat. 42.)

"*Be it enacted, &c.,* That suits by the United States to vacate and annul any patent to lands heretofore erroneously issued under a railroad or wagon road grant shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents, and the limitation of section eight of chapter five hundred and sixty-one of the acts of the second session of the Fifty-first Congress, and amendments thereto, is extended accordingly as to the patents herein referred to. But no patent to any lands held by a bona fide purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed: *Provided,* That no suit shall be brought or maintained, nor shall recovery be had for lands or the value thereof, that were certified or patented in lieu of other lands covered by a grant which were lost or relinquished by the grantee in consequence of the failure of the Government or its officers to withdraw the same from sale or entry.

SEC. 2. That is any person claiming to be a bona fide purchaser of any lands erroneously patented or certified shall present his claim to the Secretary of the Interior prior to the institution of a suit to cancel a patent or certification, and if it shall appear that he is a bona fide purchaser, the Secretary of the Interior shall request that suit be brought in such case against the patentee, or the corporation, company, person, or association of persons,

for whose benefit the certification was made, for the value of said land, which in no case shall be more than the minimum Government price thereof, and the title of such claimant shall stand confirmed. An adverse decision by the Secretary of the Interior on the bona fides of such claimant shall not be conclusive of his rights, and if such claimant, or one claiming to be a bona fide purchaser, but who has not submitted his claim to the Secretary of the Interior, is made a party to such suit, and if found by the court to be a bona fide purchaser, the court shall decree a confirmation of the title, and shall render a decree in behalf of the United States against the patentee, corporation, company, person, or association of persons, for whose benefit the certification was made for the value of the land as hereinbefore provided. Any bona fide purchaser of lands patented or certified to a railroad company, and who is not made a party to such suit, and who has not submitted his claim to the Secretary of the Interior, may establish his right as such bona fide purchaser in any United States court having jurisdiction of the subject-matter, or at his option as prescribed in sections three and four of chapter three hundred and seventy-six of the acts of the second session of the Forty-ninth Congress.

Sec. 3. That if at any time prior to the institution of suit by the Attorney-General to cancel any patent or certification of lands erroneously patented or certified, a claim or statement is presented to the Secretary of the Interior by or on behalf of any person or persons, corporation or corporations, claiming that such person or per-

sons, corporation or corporations, is a bona fide purchaser or are bona fide purchasers of any patented or certified land by deed or contract, or otherwise, from or through the original patentee or corporation to which patent or certification was issued, no suit or action shall be brought to cancel or annul the patent or certification for said land until such claim is investigated in said Department of the Interior; and if it shall appear that such person or corporation is a bona fide purchaser as aforesaid, or that such persons or corporations are such bona fide purchasers, then no suit shall be instituted, and the title of such claimant or claimants shall stand confirmed; but the Secretary of the Interior shall request that suit be brought in such case against the patentee, or the corporation, company, person, or association of persons for whose benefit the patent was issued or certification was made for the value of the land, as hereinbefore specified.